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## SUPREME COURT OF APPEALS OF VIRGINIA.

TIDEWATER RY. CO. *v.* SHARTZER.

Nov. 21, 1907.

[59 S. E. 407.]

**1. Eminent Domain—Constitutional Provisions—Damages to Property Not Taken.**—The provision of Const. 1902, art. 4, § 58, prohibiting the General Assembly from enacting any law whereby private property shall be taken or damaged for public uses without just compensation, was not a grant of power, but a limitation; and the Legislature is clothed with full legislative authority, except as to the restriction. Hence a statute declaring that a corporation invoking the exercise of the power of eminent domain must make just compensation, not only for property taken, but for adjacent or other property of the owner, and also for damages to property of any other person, is within the legitimate scope of the legislative power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 239-244.]

**2. Same—Compensation for Property Not Taken—Smoke, etc.**—In view of the terms of the prior Constitution and statutes, Const. 1902, art. 4, § 58, inserting "or damaged" in the provision prohibiting the General Assembly from authorizing property to be taken without just compensation, and Code 1904, § 1005f, providing for assessing compensation for damages to adjacent property not taken, was intended to enlarge the rights to compensation, and embraces and gives a remedy for impairment of property by noise, smoke, dust, and cinders arising from the lawful operation of a railroad, and was not intended merely to cover such damages as would have previously formed the basis of an action at common law or under the general statutes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 278-281.]

**3. Same—Construction of Constitutional Provisions—Probability of Numerous Claims.**—The fact that a certain interpretation of the Constitution relating to the power of the Legislature as to eminent domain proceedings might lead to an indefinite number of claims for damages to property not taken is not a ground for giving it a different construction.

Error to Circuit Court, Roanoke County.

Condemnation proceedings by the Tidewater Railway Company against Julia A. Shartzer. From an order confirming an amended report of the commissioners appointed to ascertain the damages to certain property not taken, the railway company brings error. Affirmed.

*Robertson, Hall & Woods* and *F. W. Christian*, for plaintiff in error.

*A. A. Phlegar* and *McClung & McClung*, for defendant in error.

KEITH, P. Upon the motion of the Tidewater Railway Company the circuit court of the county of Roanoke appointed commissioners to ascertain what would be a just compensation for "such part of the land, of the freehold whereof Jeremiah Shartzter is tenant, and for such other property as is proposed to be taken by the Tidewater Railway Company, and to assess the damages, if any, resulting to the adjacent or other property of said tenant or owner, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the company's works."

So much of their report as we are concerned with is as follows: "To the lands of Julia A. Shartzter, no part of whose land is taken: Damages to dwelling, land, and business conducted thereon, for annoyance from smoke, noise, dust, cinders, and danger from fire resulting from the construction and operation of the road in a lawful manner, \$600. We did not allow anything to Julia A. Shartzter for damages for interference with means of access to her property, as we do not think she is damaged in this respect."

The Tidewater Railway Company excepted to this report as to the allowance made to Julia A. Shartzter, and thereupon, "the court being of opinion to sustain the exceptions and recommit the said report on account of the form thereof, and because the same included damages to the business of the said Julia A. Shartzter, by consent of parties it is agreed that the said report be amended and treated as if it read as to her property as follows: "To the lands of Julia A. Shartzter, no part of which are taken, we fix the damages at the sum of \$600, and in ascertaining said damages we took into consideration the proximity thereof to the said railroad, and find that the difference in the market value of said property before the construction and operation of said railroad and afterwards will be the sum of \$600, and that said depreciation in said market value and consequential damages to said property will be caused by smoke, noise, dust, and cinders arising from the proper, ordinary, and lawful operation of said road.'"

To the report as amended by this decree the applicant again excepted, and on consideration of the said exception it was overruled by the court, and the report, as amended, confirmed. From that order a writ of error was allowed by one of the judges of this court.

The specific constitutional provision upon the subject of tak-

ing property for public uses, as it existed prior to 1902, is found in Const. 1869, art. 5, § 14, which reads as follows: "The General Assembly shall not pass \* \* \* any law whereby private property shall be taken for public uses without just compensation.

It was uniformly held, under that provision and the statute which carried it into execution, that there could be no recovery for an injury or damage to property no part of which was actually taken. This construction resulted in much hardship, and was a denial of justice in cases where the use, the enjoyment, and the value of property were greatly impaired under conditions which were held not to amount to a taking within the meaning of the law as it then existed.

Influenced by these considerations, the convention which framed the Constitution of 1902 amended section 14, art. 5, which now appears as section 58, art. 4, of the Constitution of 1902, by which is prescribed certain prohibitions on the powers of the General Assembly, and among them that "it shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation"; and the General Assembly, when it came to legislate upon the subject and give effect to this constitutional provision in section 1105f, cl. 5, Code 1904, provided, where a corporation authorized to have land condemned for its uses has complied with the requirements of the preceding section, for the "appointment of commissioners to ascertain what will be a just compensation for the land or other property, or for the interest or estate therein, proposed to be condemned for its uses, and to award the damages, if any, resulting to the adjacent or other property of the owner, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the company's works. \* \* \*"

With respect to the statute we will first observe that, if the Constitution of the state were to be construed as a grant of power to the Legislature, the statute just quoted could be maintained as being a reasonable and proper exercise by the Legislature of the delegated power. But such is not the rule of construction, as applied to the Constitution of the state. The Legislature is clothed with full legislative authority, except so far as it is restrained by some provision of the Constitution, either expressed or necessarily to be implied from the terms of that instrument. When, therefore, the Constitution says that the Legislature shall not enact any law whereby private property shall be taken or damaged for public purposes without just compensation, a statute which declares that a corporation invoking the exercise of the power of eminent domain must make just compensation, not only for the land or other property proposed to be condemned

for its uses and damages, if any, resulting to the adjacent or other property of the owner, but also for damages to the property of any other person, is within the legitimate scope of the legislative power.

Coming, then, to a consideration of the statute, it cannot be doubted that by the change of the law in the Constitution and statute it was plainly intended to enlarge the right to compensation.

"Of this," says Lewis on Eminent Domain, at section 232, speaking of similar amendments, "there can be no question. Any other construction would render the words nugatory. They are an extension of the common provision for the protection of private property. The words 'injured or destroyed' were not used in vain and without meaning. It was intended that they should have effect, and, unless they operate to impose a liability not previously existing, they are without operation. The Supreme Court of the United States, referring to the Constitution of Illinois, says: 'The use of the word "damaged," in the clause providing for compensation to the owners of private property appropriated to public use, could have been used with no other intention than that expressed by the state court. Such a change in the organic law of the state was not meaningless. But it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property sought to be appropriated to public use than was guaranteed by the former Constitution:'" 1 Lewis on Em. Dom. (2d Ed.) § 232 and authorities there cited.

The same author says: "The words in question should be liberally construed. The provisions of the Constitution requiring compensation to be made for property taken, injured, or damaged for public use are intended for the protection of private rights. They are remedial in character. They should, therefore, be liberally construed in favor of the individual whose property is affected, and the authorities so hold. The language of the Constitution is to be construed liberally, so as to carry out, and not defeat, the purpose for which it was adopted." Section 232a.

It will be observed that in the discussion of this subject text-writers and adjudicated cases use the words "damaged" "injured," and "injuriously affected" as being equivalents and meaning in substance the same thing.

Considering the terms of the Constitution and of the statute as they stood prior to 1902, and recognizing that the changes then introduced were designed to enlarge the right to compensation and extend it to cases where, under the old law, compensation was denied, it would seem that the language employed in the existing Constitution and Code are not difficult of interpretation, and should be held to embrace and give a remedy for every

"physical injury to property, whether by noise, smoke, gases, vibrations, or otherwise." Lewis on Em. Dom. § 236.

It is contended on the part of plaintiff in error that "the proper construction of the clause under consideration is to take away from public service corporations the immunity that they have heretofore enjoyed under legislative sanction, and place them on the same footing with individuals and private corporations. The words 'or damaged' mean actionable damages; that is, such damages as would form the basis of an action at common law or under some general statute, such as may be caused by the physical invasion of property or an interference with some right, public or private, appurtenant to the property."

To this proposition we cannot give our unqualified assent. A person, natural or artificial, who is asking nothing with respect to his property, is limited in the use of his own property only by the maxim that he must enjoy it in such a manner as not to injure that of another; or, less literally, but more accurately, perhaps, "so use your own property as not to injure the rights of another." Broom's Leg. Max. (7th Ed.) p. 364.

But in the cases before us the Tidewater Railway Company was not the owner of the property. It had been unable to acquire what it needed because of its "inability to agree on terms of purchase with those entitled" to the land it desired, and therefore had invoked the exercise of the power of eminent domain; and the state has seen fit to prescribe upon what terms that power shall be exercised.

It appears that the language of our Constitution was taken from that of Illinois, which was adopted in 1870, and had been the subject of judicial construction by the courts of that state and of the United States.

In *Rigney v. City of Chicago*, 102 Ill. 64, the city had constructed a viaduct or bridge on a public street, near its intersection with another street, thereby cutting off access to the first-named street from the plaintiff's house and lot over and along the street intersected, except by means of stairs, whereby the plaintiff's premises fronting on the latter street and near the obstruction were permanently damaged and depreciated in value by reason of being deprived of such access. It was held that the city was liable in damages for the injury, and in the discussion of the case rights as they existed under the Constitution of 1848 and those rights as extended by the Constitution of 1870 are compared; the court saying: "The restriction of the remedy of the owners of private property to cases of actual physical injury to the property was under the Constitution of 1848, which simply provided that private property should not 'be taken or applied to public use' without just compensation, etc. The Constitution of 1870, however, provides that 'private property shall

not be taken or damaged for public use without just compensation,' thus affording redress in cases not provided for by the Constitution of 1848, and embracing every case where there is a direct physical obstruction or injury to the right of user or enjoyment of private property, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which, by the common law, would, in the absence of any constitutional or statutory provision, give a right of action."

In *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 511, the court observes: "It is needless to say our decisions have not been harmonious on this question, but in the case of *Rigney v. Chicago*, 102 Ill. 64, there was a full review of the decisions of our courts, as well as the courts of Great Britain, under a statute containing a provision similar to the provision in our Constitution. The conclusion there reached was that under this constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using of an improvement that is public in its character, that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but, if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover. We regard that case as conclusive of this question."

The Supreme Court of the United States, in *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638, referring to the Illinois cases, says: "We concur in that interpretation. The use of the word 'damaged' in the clause providing for compensation to owners of private property appropriated to public use, could have been with no other intention than expressed by the state court. Such a change in the organic law of the state was not meaningless. But it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property, sought to be appropriated to public use, than was guaranteed by the former Constitution."

In *Baker v. Boston Elevated Ry. Co.*, 183 Mass. 178, 66 N. E. 711, it is held that under St. 1894, p. 764, c. 548, § 8, providing for compensation for damage caused by the construction, maintenance, or operation of the lines of the Boston Elevated Railway Company, "noise which, operating with other causes, would constitute a private nuisance to abutting property, if it were not authorized, is special and peculiar damage, for the whole of which compensation can be recovered, without seeking to determine how much of the effect is due to that part of the noise which alone would not constitute a liability and how much to the excess." In the course of its opinion the court in that case says:

"In dealing with the question which is presented, we have a helpful analogy in the rules of common law. Noise is necessarily incident to the transaction of many kinds of business, and so long as it is not excessive it is not unlawful. But when it is so great as to become a nuisance to property in the vicinity it is actionable. It is judged by its effect, and not merely by its cause. In England, the difference in effect between damage which, as between private persons, would give a right of action for a nuisance, and that which is permissible in the use of land, is often treated as an important consideration, if not an absolute test, in deciding what shall be paid for by a corporation acting under public authority. \* \* \* Disturbance which constitutes a private nuisance may be treated as causing damage different in kind, and not merely in degree, from that caused by disturbance which falls short of being a nuisance. Damage from noise, which is unlawful by reason of its excess, may well be considered unlike the detriment which is so slight as to be legally permissible in the ordinary use of property.

"In the case at bar it is found that, but for the statutory authority, the noise 'would constitute a private nuisance of a grave character to the petitioner's said estate.' At common law, in such a case, the rights of the owner of the property affected, and his relations to the cause of the disturbance, are treated as very different from those of the general public, who are also affected by it, and he is entitled to compensation in damages. \* \* \* We are of opinion that noise, such as would constitute a private nuisance to abutting property if it were not authorized, should be treated as causing special and peculiar damage under this statute, which entitles the landowner to compensation."

In *Swift & Co. v. Newport News*, 105 Va. 108, 52 S. E. 821, 3 L. R. A. (N. S.) 404, this court said: "Where private property has been simply damaged by a public improvement, but no part thereof has been taken, the measure of damages is the diminution in the value of the property by reason of the improvement—difference between the fair market value of the property immediately before and after the construction of the public improvement."

But, as was said by the Supreme Court of California, in *Eachus v. Los Angeles Consol. El. R. Co.*, 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149, quoted with approval by Lewis on *Em. Dom.* § 236; "The Constitution does not, however, authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the

Constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable, by reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent render the property less desirable, and even less salable; but this is not an injury to the property itself, so much as an influence affecting its use for certain purposes. But whenever the enjoyment by the plaintiff of some right in reference to his property is interfered with, and thereby the property itself is made intrinsically less valuable, he has suffered a damage for which he is entitled to compensation."

"A recovery has not been allowed," says Lewis on Eminent Domain (same section), "in any case, unless there was some physical injury to the plaintiff's property, or, by noise, smoke, gases, vibrations, or otherwise, an interference with the street in front of his property, or with some right appurtenant thereto, or which he was entitled to make use of in connection with his property. On the other hand, several cases have held that mere depreciation, caused by the proximity of a public improvement, afforded no ground for redress."

No question is raised in this case as to the amount of damages allowed. The sole question is whether or not the depreciation in market value and consequential damages to property, caused by smoke, noise, dust, and cinders arising from the ordinary and lawful operation of a railroad, are the subject of compensation, under the provisions of our Constitution and laws.

"The operation of a railroad," says Lewis on Em. Dom. § 230, "the switching of cars to and fro, the use of coalbins, stockyards, etc., may be a serious annoyance to the occupiers of adjacent property, by reason of the noise, smoke, cinders, vibrations, smells, etc. The use and value of property may be greatly impaired thereby. The question whether such an impairment of property constitutes an independent cause of action is quite distinct from the question whether such annoyances may be taken into consideration when part of a tract is taken, or when a railroad is laid in a street or highway. In the latter case the annoyances referred to are mere incidents to what is in law the main grievance. But in the former case they constitute the principal and only cause of complaint. Whether the impairment caused by such annoyances constitutes a taking we have already considered. But, whether a taking or not, it would seem that such an impairment of property was a damage or injury within the purview of recent Constitutions. Where the use and operation of a railroad \* \* \* depreciates the value of property by reason of the noise, smoke, vibration, etc., his property is damaged within the Constitution, and he is entitled to compensation."

Such being, as we think, the proper interpretation of the Con-

stitution, the thought at once arises that it will give rise to an indefinite number of claims. We cannot state this proposition more satisfactorily than is done by the author whom we have already quoted so extensively.

In section 227, *Lewis on Em. Dom.*, it is said of this contention that it is without merit. "The Constitution guarantees compensation for property damaged or injured for public use. The right to compensation is coextensive with the damage or injury, both in space and in amount. This point was fully considered in the *McCarthy Case* (*McCarthy v. Metropolitan Bd. of Wks.*, 8 C. P. 191), and in reference to it Justice Bramwell says: 'If it is to be asked where the line is to be drawn, I answer, not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing place 10 miles away, if there was no other within 20 of the premises affected. The line is to be drawn by ascertaining whether the premises are actually or potentially affected, for present or other purposes of the man, whether it is only the person who happens to be using them. It is said this might give the right to make an immense number of claims. Suppose it did. Suppose there were 1,000 claims of £1,000 each. If they are well founded, £1,000,000 of property is destroyed, and why is not that part of the cost of the improvement; and, if taken into account as such, why should not the loser of it receive it?'"

Lord Penzance, in the same case, observes: "It was asked in argument where are the claims to compensation to stop, if the rule is so applied? The answer, I think, is, that in each case the right to compensation will accrue whenever it can be established to the satisfaction of the jury or arbitrator that a special value attaches to the premises in question by reason of their proximity to or relative position with the highways obstructed, and that this special value had been permanently destroyed or abridged by the obstruction. If this limit be thought to be a wide one, and the number of claimants under it likely to be numerous, that is only the misfortune of the undertaking; for the limit does not exceed the range of the injury. On the other hand, all claim for compensation will vanish as, receding from the highway, the case comes into question of lands of which (though their owners may have used the highway and found convenience in so doing) it cannot be predicated and proved that the value of the lands depends on the position relatively to the highway which they occupy." That case dealt with the obstruction of a highway, but its reasoning applies as well to the diminution in value occasioned by smoke, noise, dust, and cinders.

It is impossible to lay down any arbitrary rule upon the subject—certainly none based upon mere measurements. It will be for commissioners and juries, under the supervision of the courts,

to determine upon the facts of each case whether or not there has been such damage to property as should be compensated. Of course, claims without merit will not be preferred; but it will be the duty of those intrusted with the administration of the law—commissioners, juries, and courts—to separate those deserving of compensation from those which are without merit.

For these reasons, we are of opinion that there is no error in the judgment of the circuit court and it is affirmed.

Affirmed.

#### Note.

The decisions of the courts upon the question whether, in estimating damages to property not actually taken, the noise, smoke and vibration caused by the engines and cars used in the operation of the railroad can be considered, are somewhat conflicting; some of the decisions seeming to hold that the noise and confusion thus caused are the necessary and lawful incidents of the operation of railroads, and therefore that the damages to lands abutting upon or near the railroad thereby caused, are *damnum absque injuria*. But it is gratifying to note that Virginia has placed herself on the side of the majority and what seems to us the best considered decisions. The Constitution gives to every property owner whose property is damaged for the public use the right to compensation; and the jury may consider all inconveniences from the sound of whistles, ringing of bells, rattling of trains, jarring of the ground, or from smoke, excluding all such damages as affect the owner in common with the other members of the community. The court in its opinion having considered some of the earlier cases on this point, this note will be confined to a brief consideration of some of the more recent decisions, and especially to those decided by the Supreme Court of Illinois, since it appears that the language of our constitution was taken from the constitution of 1870 of that state, the latter having been repeatedly construed by the courts of Illinois and of the United States, and to a few other claims which may arise under the "or damage" clause, other than for smoke, noise, and vibration.

In *Illinois Central R. Co. v. Trustees of Schools, etc.*, 72 N. E. (Illinois) 42, the court said: "The provision of the Constitution must have a reasonable and practical interpretation, and cannot be extended to require compensation to every person in the community who can hear the noise of a train or be interrupted to some extent by it. Accordingly, it was held, in *Aldrich v. Metropolitan West Side Elevated Railroad Co.*, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237, that there could be no recovery for the usual noise and vibration attendant upon the operation of the railroad. In that case the declaration in some of its counts, stated a good cause of action, charging obstruction of access to the premises, vibration and consequent damages to the property, but the evidence showed that there had been no direct physical disturbance of any right, public or private, which the plaintiff enjoyed in connection with her property. The road was not constructed in the street along the plaintiff's property, insuring or destroying any right which she enjoyed in connection with it, and her damages were of the same kind as those sustained by the general public. The distinction between that case and the cases of *Chicago, Milwaukee & St. Paul Railway Co. v. Darke*, supra, and *Chicago, Peoria & St. Louis Railway Co. v. Leah*, 152 Ill. 249, 38 N. E. 556, was there pointed out. In

the first of those cases, cinders, ashes, and smoke were thrown and blown directly on the plaintiff's premises in considerable amount, and there was no direct physical injury to the property. In the other case the plaintiff was the owner of a piece of land fronting on a narrow street, 20 feet wide, which the railroad crosses diagonally opposite plaintiff's premises, from which it was distant at the nearest point 6½ feet. The street afforded the only approach to the premises, and there was a switch near by, and in both cases the premises were occupied for dwellings."

In *Illinois Central R. Co. v. Trustees of Schools, etc.*, 72 N. E. (Illinois) 42, the court said: "The damage must be a damage to property, and not to a mere personal inconvenience or injury, such as a damage to trade or business. *Hohmann v. City of Chicago*, 140 Ill. 226, 29 N. E. 671. If a right of action is merely personal, without reference to property, the Constitution does not guaranty compensation. If the injury amounts only to an inconvenience or discomfort to the occupants of property which would authorize a personal action, but not affecting the value of the property, it is not within the provision. The injury must also be actual, susceptible of proof, and capable of being approximately measured. It must not be merely speculative, remote, prospective, or contingent. The special damage must be different in kind from that sustained by the general public, although it does not cease to be special because a considerable number are affected in the same way. *City Chicago v. Union Building Ass'n*, 102 Ill. 379, 40 Am. Rep. 598. The general public does not mean the people of the state at large, or of some other town or city who are not affected at all by the improvement, but it means the people of the whole neighborhood, and, if the damages differ only in degree from those suffered in common by such public, the injury is not within the provisions of the Constitution."

In *Chicago G. W. Ry. Co. v. First Methodist Episcopal Church*, 102 Fed. 85, citing and following *Baltimore, etc., R. Co. v. First Baptist Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719, 27 L. Ed. 739, the court said: "The smoke, cinders, offensive smells, and loud and protracted noises which are a nuisance to the plaintiff are not consequential and unavoidable damages due from a lawful running of the defendant's trains over its track in the street, but result from the erection and use by the defendant of its water hydrant and station, the one in and the other on the street in close proximity to the plaintiff's church, and which do not affect in a like injurious manner the public generally, or other property situated elsewhere on Choctaw street. In legal effect, the nuisance resulting from the use made of these structures by the defendant constitutes a partial taking of the plaintiff's property, for which compensation must be made. *Stevens v. Railroad Co.* (Super. N. Y.), 8 N. Y. Supp. 313; *Lahr v. Railroad Co.*, 104 N. Y. 295, 10 N. E. 528; *Kane v. Railroad Co.*, 125 N. Y. 186, 26 N. E. 278, 11 L. R. A. 640; *Drucker v. Railway Co.*, 106 N. Y. 157, 12 N. E. 568; *Duychinck v. Railroad Co.*, 125 N. Y. 710, 26 N. E. 755; *Cogswell v. Railroad Co.*, 103 N. Y. 10, 8 N. E. 537; *Peyser v. Railroad Co.*, 13 Daly 122; *Smith v. Railroad Co.* (Com. Pl.), 18 N. Y. Supp. 132; *Bohn v. Railway Co.*, 129 N. Y. 576, 29 N. E. 802, 14 Ed. 344. If two private citizens own adjacent lots, one of them cannot establish and maintain on his own lot a nuisance which has the effect of depriving his neighbor of any beneficial use of his lot without making compensation for the injury; and no more can a private corporation erect and maintain a nuisance on its own premises, or in a public street, which has the effect to deprive an adjacent or abutting

owner of the beneficial use of his property, without making compensation for the injury. There is no such thing as a natural person or a private corporation having a 'lawful right' to invade the premises of an abutting owner, and appropriate his property; and there is no difference in principle between an actual physical invasion of one's property and the creation and maintenance of a nuisance which has the effect to deprive him of his beneficial use. The abutting owners of property on a public street have as good right to the free enjoyment of the easements of light and air as they have of their property itself. Without the free enjoyment of these easements, they could have no beneficial use of their property. And it is well settled that filling the air with smoke, cinders, and offensive odors materially injures the easements of light and air, to the free enjoyment of which the abutting owners of property upon a street have a legal right, and constitutes, in legal effect, a taking of property."

Under the Texas constitution, art. 1, § 17, providing that no person's property shall be taken, damaged, or destroyed for, or applied to, public use, without adequate compensation being made, a property owner is entitled to recover from a railroad which constructs its yards so near the plaintiff's residence as that the noise, smoke, cinders, and gas from the operation by defendant of its locomotive thereon injuriously affects the plaintiff's property. *Missouri, K. & T. Ry. Co. of Texas v. Calkins*, 97 S. W. (Texas) 852; *Novich v. Trinity & B. V. Ry. Co.*, 101 S. W. (Texas) 476.

**In Absence of Actual Damage.**—A property owner may recover damages for personal annoyance and inconvenience suffered by her and her family on account of the noise, smoke, and vibration caused by the operation of a railway near her residence, though her property was not damaged, and no negligence was shown in the operation of the defendant's trains or in the use of its property. *St. Louis, S. F. & T. Ry. Co. v. Shaw*, 88 S. W. (Texas) 817.

But in *Illinois Central R. Co. v. Trustees of Schools, etc.*, 72 N. E. 39, it was held, in an action by school trustees for damages resulting from the operation of a railroad near a schoolhouse, that there can be no recovery for the vibration of the ground caused by passing trains, without evidence of actual damages.

**Elevated and Underground Railroads.**—In a petition for the assessment of damages to abutting property by an elevated railroad, the noise from the elevated railroad, and the aggravation of the noise from cars running on a surface track previously constructed, due to the elevated structure, are elements of damage, rendering admissible the testimony of an expert as to the aggravation of the noise caused by cars running on the surface track. *Logan v. Boston Elevated Ry. Co.*, 74 N. E. (Mass.) 663.

Where a street was taken for an elevated railroad, it was proper to award to abutting owners, not owners of the street, an amount equal to the difference between the value of the property before and after the taking, less the consequential damages due to the annoyance caused by noise, vibration, unsightliness of structure, and all elements other than the value of easements of light, air, and access. *In re Brooklyn Union Elevated R. Co.*, 99 N. Y. S. 222, 113 App. Div. 817.

The running of trains below the surface of the street does not interfere with the easement of access appurtenant to abutting property, but the running of trains on an elevated structure is the taking of such easement for which compensation must be made. *Caldwell, v. New York & H. R. Co.*, 97 N. Y. S. 588, 111 App. Div. 164.

**Damages Resulting from Danger to the Person or Stock of Owner.**

—In *Chicago P. & St. L. Ry. Co. v. Nix*, 137 Ill. 141, 27 N. E. 81, it was held proper to instruct the jury that in assessing damages they might consider the danger arising from the use of lands lying along the proposed land of the railroad.

Damages resulting from danger to the person or stock of the owner of land from the construction and operation of a trolley line are too remote, uncertain, and speculative to be considered by the jury in fixing the amount of the owner's compensation for lands taken and for the depreciation in the value of the lands which will be damaged, but not actually taken, by the construction and operation of the proposed road. *Indianapolis & Cincinnati Traction Co. v. Larrabee, et al.*, 80 N. E. (Indiana) 413.

Under Indiana acts, 1903, p. 426, ch. 227, interurban railroads are required to fence their right of way, and the danger to animals on the land adjoining, but not taken by them, will be only speculative, and should not be considered in determining the diminution of the market value of such land. *Indianapolis & Cincinnati Traction Co. v. Larrabee, et al.*, 80 N. E. (Indiana) 413.

In proceedings to condemn land for a railroad right of way through a stock farm, the jury may consider the increased danger to live stock, if any, only so far as it effects a depreciation in the market value of the land not taken; damages to the stock, which may result from the negligence of the railroad, being too remote to be considered in such proceeding. *Chicago Southern Ry. Co. v. Nolin*, 77 N. E. 435, 221 Ill. 367.

**Depreciation Resulting from Risk of Fire.**—In a proceeding by a railroad company to condemn land for a right of way, the depreciation in the value of the land not taken because of the risk of fire from passing locomotives may be considered. *St. Louis Belt & Terminal Ry. Co. v. Mendonsa*, 193 Mo. 518, 91 S. W. 65; *Chicago, P. & St. L. Ry. Co. v. Nix*, 137 Ill. 141, 27 N. E. 81; *Shirley v. Southern Ry. Co.* in *Kentucky*, 89 S. W. (Kentucky) 124.

In proceedings to condemn land for a railroad right of way through a farm, the jury may consider the increase in the risk of loss to the owner from fire, if any, only so far as it affects a depreciation in the market value of the land not taken; from loss by fire which may result from the negligence of the railroad being too remote to be considered in such proceedings. *Chicago Southern Ry. Co. v. Nolin*, 77 N. E. 435, 221 Ill. 367.

**Interference with Easement of Access.**—The interference with the easement of access to the owner's property may be considered in assessing the damages incurred by the owner of the property which has been taken for the use of a railroad. *Caldwell v. New York Ry. Co.*, *H. R. Co.*, 97 N. Y. 588, 111 App. Div. 164; *Shirley v. Southern Ry. Co.* in *Kentucky*, 89 S. W. (Kentucky) 124.

See notes to *Lake Erie W. R. Co. v. Scott*, 8 L. R. A. 330; *Gainesville H. & W. R. Co. v. Hall*, 9 L. R. A. 298; *Selden v. City of Jacksonville*, 14 L. R. A. 370; *Memphis & C. R. Co. v. Birmingham S. & T. R. R. Co.*, 18 L. R. A. 166; *Hickman v. City of Kansas*, 23 L. R. A. 658; *Hamilton v. Pittsburg B. & L. E. R. Co.*, 51 L. R. A. 320; *Aldrich v. Metropolitan West Side Elevated R. Co.*, 57 L. R. A. 237; *Leiper v. City and County of Denver*, 7 L. R. A. (N. S.) 108; *Scrutchfield v. Choctaw O. & W. R. Co.*, 9 L. R. A. (N. S.) 496.